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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHARLES EUGENE WILLIAMS, JR., Defendant and Appellant.	F056243 (Super. Ct. No. FP3533A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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Appellant Charles Eugene Williams, Jr. raises various challenges to the Sexually Violent Predator Act (SVPA; Welf. & Inst. Code, § 6600 et seq.),[1] as amended by Senate Bill No. 1128 and Proposition 83. In *People v. Garcia* (2008) 165 Cal.App.4th 1120 (*Garcia*), we rejected similar arguments, but the California Supreme Court has since granted review in *Garcia* and several other cases. (See *People v. McKee* (2008) 160 Cal.App.4th 1517, review granted July 9, 2008, S162823; *People v. Johnson* (2008) 162 Cal.App.4th 1263, review granted Aug. 13, 2008, S164388; *Garcia, supra,* 165 Cal.App.4th 1120, review granted Oct. 16, 2008, S166682; *People v. Riffey* (2008) 163 Cal.App.4th 474, 486-489, review granted Aug. 20, 2008, S164711; *People v. Boyle* (2008) 164 Cal.App.4th 1266, review granted Oct. 1, 2008, S166167.) As we did in *Garcia*, we again reject Williams's challenges to the SVPA. Accordingly, we affirm.

PROCEDURAL AND FACTUAL SUMMARY

In January 1999, Williams was convicted of lewd or lascivious acts with a child under the age of 14 years. (Pen. Code, § 288, subd. (a).) He was sentenced to eight years in prison.

On June 11, 2007, the Kern County District Attorney filed a petition seeking to commit Williams as a sexually violent predator (SVP) pursuant to the SVPA. On June 15, 2007, the district attorney filed a supplemental declaration in support of the petition.

On June 21, 2007, a contested probable cause hearing was held. The court found probable cause that Williams was likely to engage in sexually violent predatory behavior upon his release from custody, and set the matter for a jury trial.

On August 28, 2008, Williams filed a motion to dismiss the petition on the ground that the required evaluations were invalid because they were prepared in accordance with

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise noted.

a standardized assessment protocol that was not adopted pursuant to the Administrative Procedures Act (APA; Gov. Code, § 11340 et seq.), as required. On September 9, 2008, the district attorney filed opposition to the motion. On September 23, 2008, the court heard argument and denied the motion.

At trial, Dr. Robert Owen, a licensed clinical psychologist under contract with the State Department of Mental Health (the Department) to perform SVP evaluations, testified that he diagnosed Williams with pedophilia with a sexual attraction to girls, and antisocial personality. Dr. Owen concluded Williams was a "volitionally impaired" person, which in turn "predispose[d] him to commit new sexual offenses." According to the Static-99 test, Williams had a high risk of reoffending. Dr. Owen considered other static and dynamic risk factors as well. Overall, Dr. Owen believed Williams "pose[d] a serious risk of reoffending" by committing predatory sexual offenses.

Dr. Garrett Essres, also a licensed clinical psychologist that performed SVP evaluations for the Department, testified that he diagnosed Williams with paraphilia (a broad category including several sexual deviations), substance abuse and antisocial personality disorder. Dr. Essres utilized the Static-99 test, and two other tests, which were commonly accepted as reliable. Dr. Essres believed Williams had "an emotional or volitional impairment" that made him likely to commit sexual offenses. Dr. Essres believed Williams was predatory and likely to reoffend.

On September 25, 2008, the jury found that Williams met the criteria for commitment as an SVP. The next day, the court ordered Williams committed to the custody of the Department for an indeterminate term.

DISCUSSION

I. The Amended SVPA

Prior to 2006, a person found to be an SVP was committed to the custody of the Department for a two-year term. At the end of that term, the person was required to be

released or another petition was required to be filed seeking a determination that the person remained an SVP. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3.)

In 2006, the SVPA was amended first by the Legislature and then the electorate in a substantially similar manner.[2] The SVPA now provides that a person determined to be an SVP must be "committed for an indeterminate term to the custody of the … Department … for appropriate treatment and confinement in a secure facility." (§ 6604.)

Once committed, the person must have "a current examination of his or her mental condition made at least once every year." (§ 6605, subd. (a).) A report in the form of a declaration must be filed after the examination to consider (1) whether the committed person currently meets the definition of an SVP; (2) whether conditional release to a less restrictive alternative or unconditional release is in the best interest of the person; and (3) when release is appropriate, whether conditions can be imposed that adequately would protect the community. (*Ibid.*) This report must be filed with the trial court that committed the person and must be served on the prosecuting agency and the committed person. The committed person may retain, or the court may appoint, a qualified expert to examine him or her. (*Ibid.*)

If the report concludes the committed person no longer meets the requirements of the SVPA, or that conditional release is appropriate, the Department must authorize the committed person to petition the trial court for discharge or conditional release. (§ 6605,

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[2] In September 2006, Senate Bill No. 1128 amended the SVPA primarily by changing the former two-year civil commitment for a person found to be an SVP to a commitment of an indeterminate term. There were several significant procedural changes implemented by the 2006 amendments as well. (Stats. 2006, ch. 337, §§ 53-62, hereafter Senate Bill No. 1128.) Later, the voters approved Proposition 83 ("Jessica's Law"), which also amended the SVPA and several other statutes addressing violent sex offenses. (See Historical & Statutory Notes, 73D West's Ann. Welf. & Inst. Code (2009 supp.) foll. § 6604, p. 153; Prop. 83, § 27, as approved by voters, Gen. Elec. (Nov. 7, 2006, eff. Nov. 8, 2006).) Like Senate Bill No. 1128, Proposition 83 changed the two-year civil commitment to an indeterminate civil commitment.

subd. (b).) The petition must be filed with the court and served on the prosecuting agency. (*Ibid.*) The trial court must then set a probable cause hearing to consider the petition and any accompanying material. (*Ibid.*) If the trial court determines that probable cause exists to believe the petition has merit, it must set a hearing on the issue, at which time the committed person is entitled to all of the constitutional protections provided at the initial commitment hearing. (§ 6605, subds. (c), (d).) Either side may demand a trial by jury and may retain experts to examine the committed person. (§ 6605, subd. (d).) The burden of proof remains on the state to establish that the committed person is still an SVP. (*Ibid.*)

The Department also has an ongoing obligation that extends beyond the annual review. If at any time the Department "has reason to believe" a committed person is no longer an SVP, "it shall seek judicial review of the person's commitment." (§ 6605, subd. (f).) Similarly, if at any time the Department determines the committed person's "diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community," a report so stating and recommending conditional release of the committed person must be sent to the trial court, the county attorney, and the committed person's attorney. (§ 6607, subd. (a).) The trial court is required to hold a hearing on the report. (§ 6607, subd. (b).)

A committed person also has another avenue for filing a petition, this one not requiring the Department's approval. After the first year of commitment, a committed person may petition the trial court for discharge or conditional release without the "recommendation or concurrence" of the Department. (§ 6608, subds. (a), (c).) The committed person is entitled to counsel and must serve the petition on the Department. (§ 6608, subd. (a).) The trial court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (*Ibid.*)

If a hearing is appropriate, all parties must be provided with at least 30 days' notice. (§ 6608, subd. (b).) At the hearing, the committed person has the burden of proving by a preponderance of the evidence that the petition should be granted. (§ 6608, subd. (i).) If the trial court determines the committed person would not be a danger to others, the trial court shall order the person placed in a state-operated forensic conditional release program. (§ 6608, subd. (d).) If the petition is denied, the committed person may not petition the trial court again for one year. (§ 6608, subd. (h).) Any subsequent petition shall be denied by the trial court "unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing [is] warranted." (§ 6608, subd. (a).)

II. Due Process

Williams contends the amended SVPA denies him due process of law under the federal and state Constitutions because it permits an indefinite commitment and provides for inadequate judicial review.

Our conclusion in *Garcia* that the SVPA complies with due process is consistent with numerous state appellate decisions and United States Supreme Court precedent.[3] As we have explained, the SVPA requires annual evaluations to determine whether a committed person is still an SVP (§ 6605, subd. (a)) and, if the person qualifies, the

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[3] There is United States Supreme Court authority holding that an initial civil commitment for an indefinite term does not violate due process merely because it is indefinite. (See *Jones v. United States* (1983) 463 U.S. 354, 368 [statute providing for indefinite commitment of criminal defendant found not guilty by reason of insanity and requiring him to prove by preponderance of evidence that he is no longer insane or dangerous in order to be released does not violate due process]; see also *Kansas v. Hendricks* (1997) 521 U.S. 346 [upholding Kansas Sexually Violent Predator Act, which provided for commitment until mental abnormality or personality disorder has so changed that committed person no longer dangerous]; see also *Foucha v. Louisiana* (1992) 504 U.S. 71, 77 [indefinite civil commitment consistent with due process if commitment statute provides fair and reasonable procedures so that person is held only as long as he is both mentally ill and dangerous].)

Department must authorize him or her to petition for discharge or conditional release (§ 6605, subd. (b)). At the hearing, the committed person has the right to appointed counsel, the right to a jury trial, and the right to an appointed expert. (§ 6605, subd. (d).) The state has the burden of proving beyond a reasonable doubt that the person is to remain committed. (*Ibid.*)

If the Department does not authorize a petition under section 6605, the committed person may nevertheless file a petition under section 6608, but the committed person then bears the burden of proof by a preponderance of the evidence (§ 6608, subd. (i)).

Moreover, if at any time the Department has reason to believe the person committed is no longer an SVP, it must seek judicial review of the commitment. (§ 6605, subd. (f).)

Due to the requirement of an annual review, the commitment period is "only *potentially* indefinite." (*Kansas v. Hendricks, supra,* 521 U.S. at p. 364.) The annual review and the other methods by which a committed person may seek discharge or conditional release under the SVPA, which ensures that the person remains committed only as long as he or she meets the statutory definition of an SVP, satisfies constitutional requirements. (§ 6608; see *Kansas v. Hendricks, supra,* at pp. 364-365.)

In addition, an SVP commitment proceeding is civil in nature (*People v. Collins* (2003) 110 Cal.App.4th 340, 348), and although a committed person in an SVP proceeding is entitled to due process, the protections afforded are measured by the standard applicable to civil, not criminal, proceedings (*Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 738). Due process is a flexible concept calling for whatever procedural protections a particular situation demands. (*People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1399.) We reject Williams's due process challenges for the reasons explained here and in *Garcia*.

III. Equal Protection

Williams next asserts that the SVPA violates the equal protection clause of the state and federal Constitutions because it treats mentally disordered offenders who commit a sexual offense—the group that includes Williams—differently than mentally disordered offenders who do not commit a sexual offense—the group that includes mentally disordered offenders (MDO's) committed pursuant to the Mentally Disordered Offender Act (MDOA; Pen. Code, § 2960, et seq.) and persons committed after being found not guilty of a crime by reason of insanity (NGI's) pursuant to Penal Code section 1026, et seq. According to Williams, because the classification scheme affects a fundamental right—liberty—the law is subject to strict scrutiny and must be tailored narrowly to further a compelling state interest. (See *People v. Olivas* (1976) 17 Cal.3d 236, 243 [in cases involving suspect classifications or fundamental interests, state bears burden of establishing compelling interest justifying law]; *People v. Green* (2000) 79 Cal.App.4th 921, 924 [strict scrutiny is appropriate standard when measuring claims of disparate treatment in civil commitment].)

Williams is correct that SVP's are treated differently than persons committed under other civil commitment statutes. For example, SVP's are subject to an indefinite commitment while MDO's are limited to one-year renewable terms. NGI's may petition for release after 180 days of commitment, and the court may not summarily reject their petition. (Pen. Code, § 1026.2, subds.(a), (d); *People v. Soiu* (2003) 106 Cal.App.4th 1191, 1198 & fn. 8.) A court may summarily reject a petition filed by an SVP upon a finding that the petition is frivolous. (§ 6608, subd. (a).)

Williams is incorrect, however, that SVP's are similarly situated to persons committed under other civil commitment statutes. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1163.) The SVPA acknowledges that persons committed pursuant to

its authority may have mental disorders that will never successfully be treated. (§ 6606, subd. (b);[4] see also *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1209, 1222.) In contrast, the law anticipates that persons committed under Penal Code section 1026 and the MDOA will be restored to sanity or, at the least, be able with treatment to keep their mental disorders in remission. (Pen. Code, §§ 1026.2, 2962.) If persons are not similarly situated for purposes of the law, an equal protection claim fails at the outset. (*People v. Buffington, supra,* at p. 1155.) For these reasons and those explained in *Garcia,* this argument fails.

IV. Ex Post Facto, Double Jeopardy, Cruel and Unusual Punishment

Williams also argues that the SVPA violates the prohibition against ex post facto laws, subjects him to double jeopardy, and constitutes cruel and unusual punishment. But it is well settled that a commitment under the SVPA is civil in nature and legally does not amount to punishment. (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1231-1232; see also *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1179 [SVPA does not violate constitutional proscription against ex post facto laws because SVPA does not impose punishment or implicate ex post facto concerns]; *People v. Chambless* (1999) 74 Cal.App.4th 773, 776, fn. 2 [because SVPA is not punitive and does not impose liability or punishment for criminal conduct, double jeopardy and cruel and unusual punishment claims fail]; see also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 266-267 [basic purpose of ex post facto clause is to ensure fair warning of consequences of violating penal statutes and to reduce potential for vindictive legislation].)

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[4] Section 6606, subdivision (b) states: "Amenability to treatment is not required for a finding that any person is a person described in Section 6600 [i.e., an SVP], nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program."

We acknowledge that these cases were decided prior to the amended SVPA's institution of an indefinite term, which Williams contends renders the SVPA punitive. This is the same argument rejected in *Garcia* and other cases currently pending review. We continue to adopt the reasoning of those cases, which have held that the indefinite term of commitment does not convert a civil commitment under the SVPA to a punitive confinement. The constitutional protections against ex post facto laws, double jeopardy, and cruel and unusual punishment are applicable only to criminal cases, not to civil commitments under the SVPA.

V. Single-subject Rule

Williams claims that Proposition 83 is invalid because it violates the single-subject rule contained in article II, section 8, subdivision (d), of the California Constitution, which provides that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." We rejected this contention in *Garcia*, and we reject it again here for the same reasons.

An initiative does not violate the single-subject requirement if all of its parts are reasonably germane to each other and to the general objective of the initiative. (*Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1157; *Legislature v. Eu* (1991) 54 Cal.3d 492, 513 [upheld Proposition 140, which combined such disparate subjects as term and budgetary limitations and pension restrictions].) Proposition 83 addressed a number of civil and criminal statutes, but all were related to the punishment and control of sexual predators. (Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83.) The stated purpose of Proposition 83 was to "'strengthen and improve the laws that punish and control sexual offenders.'" (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1282; see Historical & Statutory Notes, 73D West's Ann. Welf. & Inst. Code (2009 supp.) foll. § 6604, p. 153; Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006, eff. Nov. 8, 2006).)

The single-subject rule does not require that the collateral parts of an initiative be equivalent—for example, that all the parts be civil, criminal, substantive or procedural. Nor does it mandate that the collateral parts be tied directly in application. The only requirement is that the provisions work together to further the initiative's stated purpose. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 347 [upheld Proposition 115 in single-subject challenge despite sweeping changes affecting various aspects of the criminal justice system]; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 247 [upheld Proposition 8]; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 575 [upheld Proposition 21].) We conclude that all the component parts of Proposition 83 bear a reasonable relationship to the initiative's stated purpose.

VI. Right to Petition for Redress

In *Garcia*, we also rejected Williams's contention that the SVPA limits his right to seek redress of grievances in violation of the First Amendment. Our federal Constitution requires that defendants have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." (*Bounds v. Smith* (1977) 430 U.S. 817, 825, overruled on other grounds in *Lewis v. Casey* (1996) 518 U.S. 343.) Williams argues that the SVPA denies committed persons meaningful access to the courts because section 6605, which permits a committed person to file a petition for release, requires the Department's authorization, a requirement which is essentially a screening tool that allows the Department to be the gatekeeper of petitions seeking release, and because section 6608, which permits a committed person to file an unapproved petition, allows the trial court to summarily deny the petition without a hearing if it concludes the petition is frivolous.

Williams cites *Ex parte Hull* (1941) 312 U.S. 546 (*Hull*), in which the United States Supreme Court held a prison regulation to be unconstitutional. The regulation required prisoners to submit all habeas corpus petitions and other legal documents to the prison's institutional welfare office and to the parole board's legal investigator. These

petitions and documents would be forwarded to the court only if they were deemed to be "properly drawn." (*Id.* at pp. 548-549.) The Supreme Court ruled that the regulation was invalid because the state and its officers "may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." (*Id.* at p. 549.)

Williams contends that the petition provision in section 6605, which depends on the Department's authorization, is analogous to the regulation discussed in *Hull.* This is not necessarily the case, given that the Department's approval is based on its evaluation of the committed person's mental condition and not a review of his or her legal papers. In any event, a committed person can petition for release pursuant to section 6608, without anyone's consent, and is entitled to the assistance of counsel in those proceedings. The committed person is not prohibited from the use of expert witnesses, including witnesses who may have been retained pursuant to section 6605, subdivision (a), to examine him or her. The petition is subject to dismissal only if it is based on frivolous grounds.[5] Neither *Hull* nor any other authority cited by Williams stands for the proposition that the First Amendment right of access to the courts encompasses the right to a particular type of proceeding. This proposition is obviously incorrect; for example, by this reasoning, a court's summary denial of a petition for writ of habeas corpus without a hearing would violate the petitioner's First Amendment rights. Accordingly, we reject Williams's First Amendment challenge.

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5 We also note that civil discovery rules applicable to SVP proceedings provide an SVP access to all of his or her medical and psychological records. (*Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1687.)

VII. Noncompliant Evaluation Protocol

We lastly address Williams's contention that his commitment is illegal and void because it was obtained with evaluations procured by the Department in violation of the APA. Government Code section 11340.5, subdivision (a), of the APA provides that "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." The Office of Administrative Law (OAL) is charged with enforcing this requirement. (Gov. Code, §§ 11340.2, 11340.5, subd. (b).)

As previously mentioned, the SVPA requires that a suspected SVP undergo two psychological evaluations conducted pursuant to a protocol established by the Department. Evaluations concluding that a person is an SVP lead to what is essentially a probable cause hearing, and ultimately to trial. (§ 6601, subds. (c), (d); *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 244-247.) Recently, the OAL found that the protocol contains "underground" regulations that were not adopted by the APA.[6] "'An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the [APA]. [Citation].'" (*Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 429.)

We need not weigh in on this conclusion because Williams is unable to show any prejudice from use of the noncompliant evaluation protocol. Article VI, section 13, of

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6 We take judicial notice of OAL Determination No. 19. (2008 OAL Determination No. 19, Aug. 15, 2008 (OAL file No. CTU 2008-0129-01) <www.oal.ca.gov/pdfs/determinations/2008/2008_OAL_Determination_19.pdf> [as of October 19, 2009].)

the California Constitution provides that a judgment cannot be set aside "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Error is reversible only where it affects the substantial rights of the parties, a party has sustained a substantial injury, and a different result would have been probable if the error had not occurred. (See also Code Civ. Proc., § 475; *Sabek, Inc. v. County of Sonoma* (1987) 190 Cal.App.3d 163, 168 [anyone seeking reversal must show error was prejudicial]; accord, *People v. Medina* (2009) 171 Cal.App.4th 805 (*Medina*) [claim that protocol's status as underground regulation undermines legitimacy of SVP commitment reviewed for prejudice].) Thus, prejudice is not presumed, and Williams has the burden of demonstrating that a miscarriage of justice has occurred. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) He cannot do so.

There is no reason to believe that a dismissal of the petition on the ground that the protocol was not APA compliant would have resulted in an abandonment of the commitment proceedings. Nor is there any evidence to support a conclusion that, had Williams been evaluated under an APA-compliant protocol, he would not have been found to be an SVP. The OAL's determination includes a caveat that its review of the protocol was only for the purpose of deciding whether it was a regulation within the meaning of the APA and that it was not evaluating the advisability or wisdom of the protocol itself. (OAL Determination No. 19, *supra,* at p. 1.)

The experts testified at trial that Williams suffered from pedophilia, paraphilia, substance abuse and antisocial personality disorder. They also testified Williams was likely to reoffend. Their opinions were based on their interviews with Williams, their independent professional training and education, the use of multiple standardized professional assessment tools, and their review of Williams's past offenses and prior treatment record. Although the experts were guided by the standardized assessment protocol, they still relied on their own professional discretion and judgment and reached

their own independent professional opinions. There is no suggestion in the record the experts felt constrained by the protocol and would have reached different conclusions had they not been required to follow the protocol.

Williams also makes no showing that, had the protocol been submitted to APA review, it would have been changed or that any changes would affect his personal standing as an SVP. Williams does not make any arguments related to deficiencies in the protocol other than to say it was not adopted pursuant to the APA. He does not attack any of the tools used pursuant to the protocol. The record is simply insufficient to show that a different result was probable had the Department's protocol been vetted through APA procedures. (*Medina, supra,* 171 Cal.App.4th at p. 820.)

Due to the fact that Williams cannot show any prejudice, his claim fails.

DISPOSITION

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Ardaiz, P.J.

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Vartabedian, J.